UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD B. SIEGEL,	:	CIVIL NO. **1:03-CV-0549**
	:	
Plaintiff	:	(Magistrate Judge Smyser)
	:	
v.	:	
	:	
ABBOTTSTOWN BOROUGH and	:	
HAMILTON TOWNSHIP,	:	
	:	
Defendants	:	

ORDER

The plaintiff commenced this action by filing a complaint on April 1, 2003. On May 20, 2003, the plaintiff filed an amended complaint. On September 4, 2003, the plaintiff filed a second amended complaint. The plaintiff subsequently filed a third amended complaint.[1]

The defendants named in the third amended complaint are Abbottstown Borough and Hamilton Township. The plaintiff alleges the following facts in his third amended complaint.

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[1]The Third Amended Complaint has not been separately docketed. On November 7, 2003, the plaintiff filed a motion requesting leave to file a third amended complaint. By an Order dated November 25, 2003, the plaintiff's motion for leave to file a third amended complaint was granted and the third amended complaint attached to the plaintiff's motion was deemed filed of record.

The plaintiff was hired by the Abbottstown-Hamilton Joint Police Department (Police Department) on or about April 1, 2001, as a patrol officer. *Third Amended Complaint* at ¶21. Todd Dunlap was employed as a patrol officer for the Police Department for approximately 15 years. *Id.* at ¶22. In the summer of 2001, the plaintiff observed what he believed to be wrongdoing and waste by Dunlap. *Id.* at ¶23. The plaintiff reported the waste and wrongdoing that he observed to elected officials of Hamilton Township and Abbottstown Borough. *Id.* at ¶25.

By a letter dated June 21, 2002, the plaintiff was given notice that his employment with the Police Department would be terminated effective June 30, 2002. *Id.* at ¶31. On July 1, 2002, the agreement between Abbottstown Borough and Hamilton Township regarding the Joint Police Department expired and the Police Department was disbanded. *Id.* at ¶32.

On July 31, 2002, Abbottstown Borough and Hamilton Township entered into a new agreement for the reinstatement of the Joint Police Department. *Id.* at ¶33. Under the new agreement, Todd Dunlap was rehired and given the title of Chief of the Police Department. *Id.* at ¶34. The plaintiff was not

rehired. *Id.* at ¶35. The plaintiff alleges that township and borough officials voted not to rehire him in retaliation for his reports of waste and wrongdoing. *Id.* at ¶36.

In February of 2003, Eric Yost was hired as a part-time patrol officer with the Police Department. *Id.* at ¶37. In March of 2003, Dough Fishel was hired as a part-time patrol officer with the Police Department. *Id.* at ¶39. Eric Yost quit his employment with the Police Department on August 9, 2003 and on October 20, 2003, David Ogle was hired to replace him. *Id.* at ¶37. The plaintiff alleges that the public officials voted to hire Yost, Fishel and Ogle instead of him in retaliation for his reports of waste and wrongdoing. *Id.* at ¶¶38 & 40.

The third amended complaint contains two counts. Count I is a 42 U.S.C. § 1983 claim that the plaintiff was retaliated against in violation of the First Amendment for his reports of waste and wrongdoing. Count II is a claim under Pennsylvania's Veteran's Preference Act, 51 Pa.C.S.A. 7101 et seq. As relief, the plaintiff is seeking reinstatement as a patrol officer, back pay and front pay as well as compensatory and punitive damages.

The parties consented to proceed before a magistrate judge pursuant to 28 U.S.C. § 636(c), and on August 26, 2003, the case was reassigned to the undersigned magistrate judge. The case is scheduled for a jury trial beginning on September 7, 2004.

On December 8, 2003, the plaintiff filed a motion for a protective order. The plaintiff is seeking an order precluding the defendants from seeking discovery of any psychological evaluations performed on the plaintiff prior to his employment with the defendants. On December 12, 2003, the plaintiff filed a brief in support of his motion. On January 2, 2004, the defendants filed a brief in opposition to the motion for a protective order. No reply brief has been filed.

The defendants contend that during the course of discovery in this case they learned for the first time that, in November of 1999, the plaintiff "failed" a Minnesota Multiphasic Personality Inventory (MMPI) psychological evaluation that was required by the Southern Regional Police Department (a prospective employer) as part of the employment process. The defendants assert that they served subpoenas on all persons and entities they believe may possess the written

psychological report. The defendants further assert that they recently learned that the psychological examination report is in the possession of the Southern Regional Police Department.

The plaintiff contends that the report is protected by the psychotherapist-patient privilege,[2] that the report should remain confidential, and that the report is not relevant to the claims in this case.

In order to adequately address the issues, we believed that we needed to review the documents at issue *in camera*. The documents at issue are not in the possession of any of the parties to this case, but rather are in the possession of a non-party, the Southern Regional Police Department. By an Order dated January 2, 2004, we directed the defendants to provide to the Southern Regional Police Department (to whom they had issued a subpoena) a copy of the court's order and we

[2]In his brief in support, the plaintiff contends that he has a legitimate privacy interest in the psychological testing report at issue and that there are strong public policy interests favoring non-disclosure of the report. The plaintiff does not directly assert that the report is protected by the psychotherapist-patient privilege. However, the plaintiff cites case law dealing with the psychotherapist-patient privilege. We construe the plaintiff's argument to be that the report is protected by the psychotherapist-patient privilege.

requested that the Southern Regional Police Department comply with the defendants' subpoena with the modification that the records at issue not be produced to the defendants but be produced to the court *in camera.* By a letter dated January 27, 2004, James C. Childs, III, the Chief of Police of the Southern Regional Police Department, submitted to the court *in camera* the Psychological Report of Michael G. Ditsky and Authorization form signed by the plaintiff authorizing the release of the results of his psychological evaluation to Chief James Childs. Ditsky's Report consists of a completed Commonwealth of Pennsylvania Municipal Police Officer's Education & Training Commission *Psychological Examination* form and a one page type-written report. The *Psychological Examination* form contains numerical scores on the MMPI Personality Test taken by the plaintiff. The one-page report contains Ditsky's interpretation of those scores.

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence. *Jaffee* involved the discoverability of records concerning counseling sessions between a police officer and a clinical social worker after the officer had fatally shot a man. The Court held that

"confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Id.* at 15. The Court reasoned that recognizing the privilege serves important private and public interests. The private interest involved was the fostering of effective psychiatric treatment. The Court reasoned:

> Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Ibid.* Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients "'is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a

> psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule ..., there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.' " Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)(quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).
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> By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Id. at 10-11.

The Court reasoned that the "psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 11.

The Court's reasoning in *Jaffee* "clearly shows that confidentiality is the foundation upon which the psychotherapist-patient privilege rests." *Barrett v. Vojtas*, 182 F.R.D. 177, 179 (W.D.Pa. 1998)

Unlike the situation in *Jaffee,* in the instant case the plaintiff underwent psychological testing knowing that the

psychologist would report his finding to the Southern Regional Police Department. Indeed, the very purpose for which the plaintiff underwent the testing was so that a report could be made to the Southern Regional Police Department. "If a patient makes a communication expecting it to be disclosed to a third party who is not involved in the patient's treatment, the psychologist-patient privilege does not apply." *Siegfried v. City of Easton*, 146 F.R.D. 98, 101 (E.D.Pa. 1992)(holding that psychologist-patient privilege did not apply to psychological records of police officer where it was understood that the psychologist would be reporting back to the police department). Knowing that the psychologist would report his findings to a third party, the plaintiff did not have a reasonable expectation that those findings and test results would be privileged. *See Kamper v. Gray*, 182 F.R.D. 597, 599 (E.D.Mo. 1998)(holding that report of psychological evaluation of applicant for position of undercover police officer not protected by privilege where it was understood results of evaluation would be submitted to employer). *See also Phelps v. Coy*, 194 F.R.D. 606, 608 (S.D.Ohio 2000)(holding that records regarding psychiatric evaluations of police officer not confidential and thus not privileged because communications were disclosed to police officer's employer); *Barrett*, *supra*,

182 F.R.D. at 181 (holding that conversations and notes taken during counseling sessions after police officer shot a citizen were not privileged where officer did not have an expectation of confidentiality in his treatment because it was known that the psychologist and psychiatrist would report back to the municipality employing the officer).

Because the plaintiff underwent the psychological testing knowing that the results would be disclosed to a third party, we hold that the report is not privileged.

Although we conclude that the report is not privileged, we nevertheless conclude that the report should not be disclosed.

Federal Rule of Civil Procedure 26(c) provides that upon good cause shown the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the disclosure or discovery not be had."

In the instant case, disclosure of Ditsky's report may embarrass the plaintiff. Also, although the plaintiff knew

that the report would be disclosed to the Southern Regional Police Department, the release signed by the plaintiff indicates that the plaintiff had an expectation that the report would otherwise remain confidential. In such a situation, as the court in *Caver v. city of Trenton*, 192 F.R.D. 154 (D.N.J. 2000), noted, disclosure may be detrimental to the public good:

> Police Officers are required to undergo psychological evaluations in order to determine whether they are mentally fit to be police officers. This testing is performed not only to benefit the officer's mental well-being, but more importantly, to ensure the safety of the community by protecting its citizens from police officers whose mental instability poses a risk to public safety. If police officers know that their psychological records may be disclosed to the public, there exists a likelihood that they would not be completely candid when speaking to a mental health professional. This lack of candor would, in turn, defeat the purpose for psychological evaluations, which is, determining mental fitness for the job. The Court recognizes that the public has an interest in knowing whether their police are mentally fit for the job, but disclosure of actual psychological records is not necessary and would have a chilling effect on frankness between patient and psychologist. If police officers are not completely honest when speaking to a mental health professional, it will make it more difficult for the mental health professional to accurately evaluate the mental status of a police officer, and to ensure public safety.

> . . . disclosure would chill the candor between the police officer and the psychologist necessary for effective diagnosis and evaluation.

Id. at 163.

Also, the defendants have failed to convince the court that the report may lead to the discovery of evidence that is relevant to the claims in this case. The defendants contend that the report is potentially relevant to the plaintiff's Veteran's Preference Act claim; more specifically, to the issue whether the plaintiff was qualified for the position at issue. However, there is no dispute that the plaintiff had a valid certification from the Municipal Police Officers' Education & Training Commission. The defendants did not send the plaintiff to Ditsky for testing and the defendants have not asserted that they required anything more (in the way of psychological tests) than certification from the Commission.

IT IS ORDERED that the plaintiff's motion (doc. 50) for a protective order is **GRANTED** and that the defendants are prohibited from seeking the psychological report of Michael G. Ditsky.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

Dated: January 30, 2004.
Filed: January 30, 2004.